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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 11.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI,
DEFENDANTS IN ERROR.

In Error to the Supreme Court of Missouri.

ADDITIONAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Nixon-Jones Ptg. Co., 215 Pine St., St. Louis, Mo.

IN THE

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The brief submitted on behalf of the defendant in error asserts many propositions of law about which

there is no dispute, the difference between counsel being principally as to the application that should be made of the decided cases. We do, however, insist that the thirteenth point of the first paragraph, on page 35 of the brief of the defendant in error, to the effect that it is not necessary that the State should have a pecuniary interest in the result of the case brought in the name of some other party, to constitute the State the real party in interest, so as to prevent a removal from the State court, and that a governmental interest is sufficient, is unsound. No authority is cited in support of that assertion, and none, we believe, will be found, while this court expressly decided to the contrary in the case of Reagan v. Farmers' Loan & Trust Co.; and later on we will refer to other cases to the same effect. Before referring to them, however, it may be well to call attention briefly to the fact that most of the cases where the question whether the State is a party or not, has been raised, are cases which have been commenced *against* some officer of the State, and, in those cases, if the State was really affected in a material sense, the decisions turned upon the question of whether some law that was invoked was constitutional or not. Such cases would have to be decided under the effect of the Eleventh Amendment to the Constitution, which denies jurisdiction to the Federal Courts in suits *against* States; but in the case at bar the question of jurisdiction does not depend upon the effect of that amendment to the Constitution, and therefore cases which are decided under that amendment are not di-

rectly controlling in the case at bar, although we may properly turn to them to ascertain the views of this court as to when a State may or may not be regarded as in effect the real party to a suit, although not named as such. Here the want of jurisdiction in the United States Circuit Court, if the State is in effect the real party, arises from the fact that no act of Congress confers such jurisdiction in case of removal from a State court. Here we have no question about bringing a State into court without its consent, because if the State is to be regarded as a party to this suit in any sense, it is as the plaintiff. We may concede at the outset that if, within the meaning of the decisions of this court, the State is really the party in interest, then the case was not removable, and since the State is not named as a party, the real question that we have to consider and determine here is whether the State should be regarded as the real party in this suit, instituted originally by the defendants in error, for the purposes indicated by the petition and the statute under which the suit was brought. It is conceded that a State may have interests of different kinds in litigation, and in the questions involved therein. It may be an interest which has been designated as a "governmental interest," — the same interest that a State has in seeing that all its laws are enforced and the rights of all its citizens recognized and protected. That sort of an interest this court has decided is not sufficient to constitute the State a party to a suit, so as to deprive the Federal Courts of jurisdiction. That sort of interest

the Supreme Court of the State of Missouri, in deciding this particular case, conceded to be insufficient for that purpose, notwithstanding the contention now made by counsel for defendants in error, that it is sufficient. On the other hand, the State may have a material and pecuniary interest which will be affected and operated upon by the judgment that may be rendered in a suit, and if that is the case, then the State is a real party to such suit. Our object, then, in considering this case must be to ascertain in which class of interests would be found any supposed interest which the State may have in this litigation. It seems to be assumed that if a suit is brought by an officer of the State in his representative capacity, that necessarily the State will have such interest in that litigation as to make it a party thereto; but such a position will be found to be untenable upon a full consideration of the subject. A State may, and often does, appear in court to assert some right that it has to or in particular property, or to recover an amount that is due to it, either upon contract or by way of penalty or forfeiture under some law or proceeding in court, or for the purpose of recalling franchises which may have been granted by it, or to vindicate its authority by punishing violations of its laws. In such cases, clearly the State is interested, and in nearly all of them it would be named as the party to the suit, and if it should delegate its power to institute the suit to some official, enabling him to conduct the litigation in his own name, — as was done in the case of Ferguson v. Ross, 38 Fed. 161, — the State would be none the less a

party in interest; but it would not be because the litigation was conducted in the name of a State officer, but because the result of the particular case would operate directly upon the rights or the property of the State. I submit that it is equally true, that if the State authorized the institution of a suit by one of its officers, not for any of the purposes previously mentioned, but for the benefit of some one or more citizens, who were to be directly benefited by the result of the suit, if successful, then the State is no more to be regarded as a party to that suit than if it had been brought in the name of the citizens, to accomplish the same result. The attitude of the defendants in error to this case is such that it is not necessary for us to contend that they had any immediate personal interest in the litigation. The three defendants in error, constituting the Board of Railroad Commissioners, in contemplation of law are in effect a body corporate, although they may not be designated as such in the statute creating the office. Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197. Whenever the law creates a commission or a board composed of several members, and delegates to them any of the power of the State, or confers upon them authority to act for any public or private purpose, they essentially constitute a corporation. Doubtless, they might proceed in their official designation of "The Board of Railroad & Warehouse Commissioners," or they might, as in the present case, proceed in their individual names, specifying their official station by way of

description; but none of these things are controlling. We are to "look through" all these mere forms and ascertain the real nature of the business undertaken by such body. The fact that that board, or the members composing it, commenced a suit in their name, does not change the character of the suit, nor alter the effect that it will have upon the rights or property of individual citizens, or of the State, any more than those rights would be affected if the suit were brought in the name of some individual or in the name of some municipal subdivision of the State. A county, or a city, or a town, is a corporation, and as such is one of the instrumentalities created and used by the State to accomplish its purposes; and yet, if a suit is instituted against a county or a city or a town, or by any of these municipal bodies, and the opposing party is a resident of another State, the Federal Courts may entertain jurisdiction. It would not, perhaps, be a probable thing, yet the statute under which the suit at bar was instituted might have provided that any county through which the railroad runs could institute a suit to accomplish the very purpose sought to be accomplished by this suit, and there would have been no question about the jurisdiction of the Federal Court, unless it had been shown and could now be shown that the only material and pecuniary interest to be affected by that suit was that of the State of Missouri. Therefore, I insist that regardless of the name in which the suit was commenced, regardless of who may be designated as plaintiff, the question that is to

determine the jurisdiction of the Federal Court, is, simply, will the judgment or decree sought operate upon the pecuniary and material interests of the State of Missouri, or upon the interests of one or more of her citizens? If upon the latter, then, certainly, the State was not a party, and the case was removable; and consequently, the State Court no longer had jurisdiction after the proper steps for removal were taken.

The same reasoning upon this question will apply whether the jurisdiction of the Federal Court is to be determined by the Eleventh Amendment to the Constitution or by an act of Congress, governing removals from State Courts. The position which we take here is sustained by various cases decided by this Court, whether they have sustained the jurisdiction or not. The reasoning of the courts either in sustaining or denying the jurisdiction of the Federal Courts, has been upon the lines above suggested.

In re Ayres, 123 U. S. 443, it was said: —

> "In this spirit it (11th Amendment) must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the *only real party* against which *alone in fact* the relief is asked, and against which the judgment or decree effectively operates."

In Pennoyer v. McConnaughy, 140 U. S. 1: —

> "The first class (where the suit is really against the

State) is where the suit is brought against the officers of the State, *as representing the State's action and liability*, and thus making it, though not a party to the record, the real party against which the judgment *will so operate as to compel it to* specifically perform its contracts."

In Reagan v. Trust Co., 154 U. S. 362–390, this court said: —

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

After speaking of the "consent" given to a suit in Travis Co., Texas, — the court said: —

"However, it is not necessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the State," p. 392, and on p. 393, the conclusion is stated that the jurisdiction should be sustained "whether we rest upon the provision of the statute, or upon the

general jurisdiction of the court existing by virtue of the statutes of Congress under the sanction of the Constitution of the United States."

In R. R. Comrs. v. R. R., 24 Florida, 417–464, the court said: —

"It appears, so far as we can find in the reported cases, that the rule which forbids a suit against officers because in effect a suit against the State applies only where the interest of the State is through some contract, or some property right of hers, or where her interest is in a suit brought, or threatened, in her own name, to enforce some alleged claim of hers. And it is important to observe the character of the interest. *It is not enough that the State should have a mere interest in the vindication of her laws, or in their enforcement* as affecting the public at large or as they affect the rights of individuals or corporations, but it *must be an interest of value to herself* as a distinct entity — of value in a material sense. She has an interest in the success of the policy of her laws and in the just administration and execution of those laws, yet it is not an interest on which she can be said to be a party affected by any private suit arising under them, where it is not an otherwise and more direct interest inhering in some separate right or claim of right of her own."

In R. R. v. Dey, 35 Fed. 866–870, the court considered the subject fully and the distinction between a State's interest in a material and pecuniary sense, and a governmental sense was clearly pointed out. Among other things it is said: —

"And in all the cases in which, where the State

> was not a party to the record, and yet the judgment of the Supreme Court was that it was a real party in interest, and therefore the Federal Court without jurisdiction, it will, I think, be found that some contract of the State was the foundation of the litigation; and that those suits, though nominally against State officers, were construed by that court as in fact suits to compel the performance by the State of its contract or to prevent it from carrying into effect measures intended to work a repudiation."

Then at length the opinion considers the laws fixing rates for transportation, and giving authority to the R. R. Commissioners and concludes as to suits arising out of such laws, that

> "the real parties in interest are the shippers and the carriers, and the judgment operates in reality upon these parties alone." * * * "The fact that these defendants, being merely officers, have no interest, is no criterion."

The fact is mentioned that in all cases against R. R. Commissioners the courts have held that they were not suits against a State.

This position was sustained in the Minnesota Case, 35 Fed. 883.

The same views were expressed by the circuit judges in Mercantile Trust Co. v. Reagan, 51 Fed. 529, and in R. R. v. Trammel, 53 Fed. 196–199.

The only case upon the question that I have found since Reagan v. Farmers' Loan & Trust Co. is Fitts v. McGhee, 172 U. S. 516. In that case the jurisdiction of the Federal Court was denied, and in

some respects the case was quite similar to the one at bar; but an examination of the case will show how entirely different it is in its essential features. The court, of course, is familiar with the case, and yet it will not be amiss to refer to some of its features. Originally it was a suit against the State of Alabama, by name, joining the Governor and the Attorney-General. Process was served upon those defendants. Subsequently the Solicitor for a certain judicial district, and individual citizens, were joined as defendants, and then, later, the case was dismissed as to the State, and when the final decree was entered there was a farther order entered, discontinuing the suit as to Mr. Oates, because he had ceased to be the Governor of the State; but all the time the object and purpose of the suit was to enjoin the State and the officers through whom she must act, as her agents and representatives, from proceeding to do certain things in which the State alone was interested; for instance, to enjoin them from proceeding to institute a suit for the forfeiture of the franchises of certain railroad corporations, — a proceeding to which no one but the State could be a party, and must be instituted, either in her name or for her use, — and, farther, to enjoin the officers of the State, who were charged with the institution and conduct of criminal proceedings, from indicting or prosecuting the plaintiffs, or their agents or servants, on account of the violation of certain laws of the State. It is only necessary to state the purpose of that suit and the scope of the injunctions which were granted during the pendency of the suit and made perpetual by the

final decree, to demonstrate that the State, alone, could have been the party interested. The case was based almost entirely upon the authority of *In re* Ayers, 123 U. S. 443, to which the case was assimilated, and the language of the opinion in the Ayers case quoted as expressive of the opinion of this court as to the nature of the case and of the interest involved in Fitts v. McGhee, and, as indicating its view of the latter case, the court quoted the language heretofore set forth, from the opinion in the Ayers case. The court could not have reached any different conclusion in the case of Fitts v. McGhee; but at the same time there is no conflict between that case and the case of Reagan v. Farmer's Loan & Trust Co., which stands undisturbed to this day, and which has been repeatedly followed in numerous cases in the Circuit Courts; and under the authority of that case it must be considered as settled that even in a case where the State officers are defendants, the State is not to be regarded as the party to the suit, when it has no material interest in the result of the case, and when its only interest is that which it may have in a governmental sense. Much more, then, must we conclude that when the State officers have instituted a suit against a citizen of another state, the State is not to be regarded as a party, when its only interest is in a governmental sense.

Recurring again to the statute under which this suit was instituted, I submit that the policy of the law is very clear, when the statute is understood. A preceding section, printed on page 51 of the original brief, made it the *duty* of the Railroad Commission-

ers to proceed to investigate and determine the truth of any complaint that might be made by persons having an interest in the subject. They thus constituted a sort of tribunal to hear and determine the controversy between shippers and passengers, on one hand, and carriers, on the other hand. If the Board of Railroad Commissioners should determine in favor of the complainants, then they, the complainants, had a right to relief from what had been adjudged to be improper action by the common carriers; but under the scheme of the statute the Railroad Commissioners had no necessary connection with the matter beyond that. No duty was imposed upon them to take any farther action on behalf of or in the name of the State. They were given the power, if in their discretion they saw fit to use it, to institute a suit in a proper court against the offending carrier,—but the right to institute such proceeding was not exclusively given to the Railroad Commissioners. The injured citizen, as shipper or passenger, or as one interested in the subject of the order previously made by the Commissioners, was not required to await the action of the Commissioners in instituting other proceedings, nor was the vindication of their right in the premises dependent upon the action of the Commission; but by the same statute they were given authority to proceed, themselves, and in their own names, and to commence such proceeding. Unlike the previous section, which made it the *duty* of the Commissioners to hear and determine the complaint, this section only provides that "in the event of disobedience of the order

made, it *shall be lawful* for the Board of Railroad Commissioners, or any company or person interested in such requirement, to apply in a summary way, by petition, to any circuit Court," etc., — and this authority might be exercised either by the citizen or the Commission in a case where the complaint involved a *private question*. Clearly but one sort of proceeding was contemplated, or rather, the same sort of proceeding was contemplated, whether it might be brought by the Board of Railroad Commissioners or any person or company interested in the order; and whether instituted by one or the other, it was to accomplish the same purpose and to afford the same relief; and that purpose and that relief did not in any sense apply to the material or pecuniary interests of the State, but, on the contrary, as was said in Reagan v. Farmers' Loan & Trust Company, it was simply a controversy between the shippers on one hand and the carrier on the other. Let us concede that the State was the active party, and the only party, interested in the action of the Board of Railroad Commissioners in hearing and determining the complaint presented to them. Up to that point the commissioners occupied the position of a court, and represented the sovereign power of the State in adjudicating upon a controversy between different individuals or corporations. Having fixed the rights of the respective parties to that controversy, it was but proper and natural that some means of securing the beneficial results of that determination should be provided, just as a method is provided by law for

the enforcement of the judgment of an ordinary Court; and though the execution of a judgment is accomplished through the exercise of the power of the State, no one will contend that the State is a party to such proceedings, in such sense and to such extent as to affect the jurisdiction of the Federal Courts in the event of any litigation with the sheriff or other officer attempting to execute such judgment. The rights affected by the determination previously made by the Board of Railroad & Warehouse Commissioners are peculiar, and could not be enforced by an ordinary execution or by any means applicable to an ordinary judgment; and in order that the interested passenger or shipper may not fail in the enjoyment of the right which he has established, the means of its enforcement is provided by the law which says that such enforcement may be accomplished by a proceeding instituted by any person or company interested in the order, — or the same thing may be done by the Board of Railroad Commissioners, acting on behalf of and as representatives and agents of the same parties who are interested in that order. This express delegation of authority to the Board of Railroad Commissioners to institute and prosecute a suit for the benefit of shippers or passengers must be regarded as falling within the provisions of Sec. 1991 of the Statutes of Missouri (p. 68 of the former brief), which provides that "a person expressly authorized by statute may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted." The various statutory pro-

visions of the State of Missouri applicable to the controversy which arose before the Board of Railroad Commissioners of that State bring the case so clearly within the reasoning of Reagan v. Farmers' Loan & Trust Company, that there should be no hesitation in deciding that this was simply a controversy between shippers, on the one hand, and the carrier, on the other hand, in which the State had no such material interest as made it a party to the suit, and that therefore the case was removable from the State to the Federal Court, and the proper step having been taken to that end, the State Court had no farther jurisdiction over the case, and therefore the judgment of the Supreme Court of the State of Missouri must be reversed.

Respectfully submitted,

GEO. P. B. JACKSON,
For Plaintiff in Error.

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vs.

H. W. HICKMAN ET AL., DEFENDANTS IN ERROR.

IN ERROR TO SUPREME COURT OF MISSOURI.

There is no merit in the contention of defendants in error that this court is concluded by the construction of the statute of Missouri by the supreme court of that State in this case.

The statute was not before the court for construction. There was no dispute as to the meaning of the statute. The court did not assume to construe it, but only referred to it by way of argument, making certain deductions from its undisputed meaning. Not only was there no clear case of construction, but there was no such established construction as to assimilate it to the rule of *stare decisis*, which this court has held necessary.

Carroll *vs.* Carroll, 16 How., 275–286.

See also—

Olcott *vs.* Fond du Lac Co., 16 Wall., 678.
Venice *vs.* Murdock, 92 U. S., 494.

Especially are the above tests applied and insisted upon in cases involving the jurisdiction of Federal courts.

See Burgess *vs.* Seligman, 107 U. S., 20–33, and 34.
Carroll Co. *vs.* Smith, 111 U. S., 556.

GEO. P. B. JACKSON,
For Plaintiff in Error.